No. 20991

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARVIN B. KAPELUS and CRENSHAW CARPET CENTER, INC.,

Appellants,

vs.

A JOINT VENTURE OR COPARTNERSHIP composed of JOSEPH J. FRANKLIN, also known as J. J. FRANKLIN, LEATRICE FRANKLIN and FLORENCE FITZGERALD, also known as FLORENCE JANES, as Joint Venturers or Copartners, and JOSEPH J. FRANKLIN, also known as J. J. FRANKLIN, LEATRICE FRANKLIN and FLORENCE FITZGERALD, also known as FLORENCE JANES, individually,

Appellees.

BRIEF OF APPELLEES.

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Appellees.

BRIEF OF APPELLEES.

Jurisdiction.

This is an appeal from an order of the district court [Cl. Tr. 151][1] affirming an order of the Referee in Bankruptcy [Cl. Tr. 145], quieting title to real property in Appellees. The court has jurisdiction of this appeal under Section 24a of the Bankruptcy Act, 11 U.S.C. Section 47a.

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[1]The transcript of record in this court is in two volumes. The first volume is the clerk's transcript of proceedings, and references to it are cited as "Cl. Tr.". The second volume is the reporter's transcript, consisting of sixteen volumes, and references to it are cited as "R. Tr."

Statement of the Case.

These proceedings commenced on August 26, 1964, when Appellees filed a petition for arrangement pursuant to Section 322 of Chapter XI of the Bankruptcy Act [Cl. Tr. 115]. Appellees remained in possession of their assets as "debtors-in-possession" under Section 342 of the Act [Cl. Tr. 115], and a committee of creditors was appointed to advise Appellees in managing their affairs [Cl. Tr. 165]. Appellees' schedule of assets and liabilities listed among their assets a 5.84 acre parcel of unimproved real property located on Katella Avenue, Anaheim, California (hereafter referred to as the "Katella property") [Cl. Tr. 137]. Ownership of the west one-half of this property is the subject of this appeal.

This controversy arose because Crenshaw Carpet Center, Inc. and its attorney Marvin B. Kapelus transformed a sale of carpeting for $7,874 [Cl. Tr. 90] plus an advancement of $3,317 [Cl. Tr. 95] into record title to 116,160 square feet of unimproved property [Cl. Tr. 110] having a net value to Appellees of about $380,-000.[2]

The relationship between Appellants and Appellees began in June, 1961. The Appellees, as family joint

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[2]Appellees were the owners of 5.84 acres on Katella Avenue, across from Disneyland and adjacent to the Melodyland Theatre [Cl. Tr. 99]. The west one-half of the property consisted of 116, 160 square feet [Cl. Tr. 110], had a gross value of $464,000 when valued as part of the whole 5.84 acres [Cl. Tr. 110], was subject to a first deed of trust securing a promissory note in the amount of $84,609 [Cl. Tr. 100], and thus had an equity of about $380,000. The east one-half of the property consisted of 119,613 square feet, had a gross value of $478,000 when valued as part of the whole 5.84 acres, and was subject to six separate first deeds of trust to secure six notes totalling $156,000 [Cl. Tr. 100].

venturers, were constructing two motels in Anaheim, California, when they purchased carpeting for one motel from Crenshaw for $7,784 [Cl. Tr. 90]. The carpeting was installed, but when Appellees were unable to meet their instalment payments, Kapelus, in June of 1962, filed suit for Crenshaw, and by writ of attachment placed a keeper in each motel [Cl. Tr. 91]. To secure removal of the keeper, the Appellees, while not represented by counsel, stipulated to entry of a judgment of $9,461 and executed a promissory note for that amount secured by a junior deed of trust covering eight different parcels of Appellees' property [Cl. Tr. 91-92]. Appellees defaulted on that note [Cl. Tr. 92]. Crenshaw began foreclosure under its deed of trust [Cl. Tr. 92] and simultaneously executed upon the judgment again by placing keepers in Appellees' motels during the 1962 Christmas holidays [Cl. Tr. 92-93].

Appellees entered into an agreement to secure withdrawal of the keeper and to forestall foreclosure under Crenshaw's deed of trust. For this concession, Appellees agreed to obtain and assign to Crenshaw an existing note and second deed of trust on one of their new apartment houses (Lot 8 of Tract 3535). In return, Crenshaw, through Kapelus, agreed to release the keeper and reconvey the blanket deed of trust [Cl. Tr. 93-94]. Although Appellees had reduced their indebtedness to Crenshaw to $8,141, the note which was assigned to Crenshaw was in the face amount of $9,000, and Crenshaw granted an option to Appellees to repurchase the note for its face value [Cl. Tr. 93]. An escrow was opened and the transaction was consummated in late January, 1963 [Cl. Tr. 94-95]. When Kapelus discovered that Schmeier, the holder of that deed of trust

on Lot 8, had filed a notice of default in October, 1962, he instructed the trustee to proceed to foreclosure sale under the Schmeier default notice [Cl. Tr. 95-96].

Crenshaw's legal right to foreclose on Lot 8 was the subject of a bitter dispute with Appellees from January, 1963, through July, 1963. The trustee under the deed of trust advised Kapelus that a valid trustee's sale could not be conducted under the Schmeier notice of default [Cl. Tr. 96]. Kapelus disagreed, and over Appellees' objections, the trustee conducted a sale on July 31, 1963 [Cl. Tr. 96]. Crenshaw made a beneficial bid of $13,910 at the sale (the amount represented what was due under the note plus advances of $3,317 made in January, 1963, to the holder of the first deed of trust on Lot 8) [Cl. Tr. 96-97]. Appellees disputed the validity of the trustee's sale and instructed their attorney to file an action to set it aside [Cl. Tr. 98].

Between July 31 and August 15, 1963, the parties settled the dispute over title to Lot 8 by agreeing upon a new security transaction. Shortly after the trustee's sale of Lot 8, Appellees suggested that Crenshaw and Kapelus reconvey title to Lot 8 to Appellees in exchange for additional security for the judgment debt and advances [Cl. Tr. 98-99]. Kapelus and Crenshaw agreed [Cl. Tr. 99]. Under the new security arrangement, Appellees agreed to execute a promissory note for $15,000 payable in 30 days. The note was to be secured by a deed of trust on two parcels: Lot 8, and Appellees' equity of about $380,000 in the west one-half of the Katella property [Cl. Tr. 98-99].[3]

[3]Although Curtis W. Reedy was the record owner of the Katella property, he held title only for the purpose of obtaining financing, and at all times he was holding the property for Ap-

On August 26th the parties opened an escrow at United Title Guaranty Company, at Santa Ana, California, to effect the new security transaction [Cl. Tr. 101].

As soon as the escrow opened Kapelus demanded an increase in the indebtedness to be shown. Kapelus instructed the escrow officer to prepare amendments to the escrow instructions raising the amount of the note from $15,000 to $20,000, changing the rate of interest on the note from 8% to 10%, providing for an A.T.A. policy of title insurance, providing for the payment to Crenshaw of the August rents on the Lot 8 apartments [Cl. Tr. 102-103], and placing the burden of all escrow costs and title policy fees on Appellees [Cl. Tr. 104]. Appellees reluctantly complied with these demands [Cl. Tr. 103-104].

Kapelus next insisted that the form of the transaction be changed. Instead of a deed of trust encumbering Lot 8 and the west one-half of the Katella property, Kapelus demanded that he and Crenshaw be vested with fee title to the west one-half of the Katella property and they would give Appellees an option to repurchase the property [Cl. Tr. 104-105].

Appellees finally agreed to the new security transaction proposed by Kapelus [Cl. Tr. 105, 107-109]. The debt due from Appellees to Appellants would be increased to $20,500 payable January 26, 1964 [Cl. Tr. 108]. Appellees would give Crenshaw and Kapelus a deed to the west one-half of the Katella property as security for the $20,500 debt [Cl. Tr. 108], but Appellees

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pellees and acting as their agent [Cl. Tr. 100-104]. Crenshaw and Kapelus knew this [Cl. Tr. 101], and there is no question but that Appellees were always the real parties in interest. On August 20, 1964, Curtis W. Reedy quitclaimed his record interest in the property to Appellees [Cl. Tr. 100].

were to remain in possession [Cl. Tr. 109]. To protect Appellees against a possible interim conveyance or encumbrance by Appellants, Appellees would be granted an option through January 26, 1964, to repurchase the property for the amount of the $20,500 debt, and the option would be recorded immediately following recordation of the deed [Cl. Tr. 109]. Appellees were to pay the August rents on Lot 8 to Appellants, and Appellees were to pay all costs of the escrow [Cl. Tr. 108-109]. And, finally, Crenshaw would reconvey Lot 8 to Appellees [Cl. Tr. 108].

The parties met at United Title Guaranty Company on September 23, 1963, to consummate the transaction [Cl. Tr. 107]. The title company had previously determined on September 17 that the transfer, if consummated, would amount to nothing more than a "mortgage" [D-41].[4] It therefore refused to issue any policy of title insurance unless the parties would execute a statement to and "For the benefit of Western Title Insurance Company" that the deed to the west one-half of the Katella property was an absolute conveyance and was not intended as a mortgage [Cl. Tr. 106-107]. All necessary documents were executed [Cl. Tr. 109], including the statement demanded by the title company [Cl. Tr. 108]; the escrow closed and the deed and option were recorded on October 10, 1963 [Cl. Tr. 110]. Title to Lot 8 was vested in Appellees; title to the west one-half of the Katella property was vested of record in Crenshaw and Kapelus; and Appellees remained in actual possession of the west one-half of the Katella property [Cl. Tr. 109].

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[4]"D-...." refers to Appellants' exhibits admitted into evidence at the trial; "R-........" refers to the exhibits of Kapelus and Crenshaw.

Prior to the expiration date in the option, January 26, 1964, Appellees tendered the $20,500 option price to Appellants. On December 31, 1963, Appellees telegraphed Kapelus and Crenshaw that they were ready to exercise the option [Cl. Tr. 111]. Kapelus refused to take payment through any escrow but insisted upon delivery of the $20,500 to his law office [Cl. Tr. 112]. Appellees met Kapelus by appointment in his office on January 21, 1964, and handed him a certified check for $20,500 in exchange for a deed to the west one-half of the Katella property [Cl. Tr. 112]. Kapelus instructed his secretary to prepare the deed and asked the Appellees to go to lunch while he obtained the necessary signatures on the deed [Cl. Tr. 113]. Upon their return from lunch, Kapelus advised Appellees he would not deliver the deed and would not accept the certified check [Cl. Tr. 49].

On January 24, 1964, Appellees filed an action in the Superior Court of the State of California, for the County of Orange, to quiet title to the west one-half of the Katella property [Cl. Tr. 114-115] and to declare the deed to Appellants to be in fact a mortgage [Cl. Tr. 44-45]. Appellees filed their answer [Cl. Tr. 62-70], and a pre-trial conference order was entered setting the case for a non-jury trial [Cl. Tr. 18]. After the Chapter XI proceedings were filed, Appellees, as statutory debtors-in-possession, filed an application in the bankruptcy court to quiet title to the west one-half of the Katella property [Cl. Tr. 40]. The application alleged two causes of action: First, to declare the deed to be in fact a mortgage; and, second, to avoid the transfer to Appellants as a fraudulent conveyance under Section 67d of the Bankruptcy Act or Section 3439.04

of the Civil Code of the State of California [Cl. Tr. 41-42]. Appellants objected to the jurisdiction of the bankruptcy court and answered on the merits [Cl. Tr. 59].

The Referee in Bankruptcy overruled Appellants' objection to jurisdiction and after further trial ruled in favor of Appellees on the merits on both causes of action. The Referee found that Appellees were in actual possession of the west one-half of the Katella property on the date the Chapter XI proceedings were filed [Cl. Tr. 109-114]. With respect to the first cause of action, the Referee found that the evidence was "unequivocal, clear and convincing" that the deed and option to purchase "were nothing more than a disguised security transaction and a mortgage" [Cl. Tr. 116], and, furthermore, the option to repurchase was properly and timely exercised [Cl. Tr. 112-113, 116]. With respect to the second cause of action, the Referee found that the deed, if not a mortgage, was not supported by fair consideration, rendered Appellees insolvent [Cl. Tr. 115], and was therefore voidable as a fraudulent transfer under Section 67d(2)(a) of the Bankruptcy Act and Section 3439.04 of the Civil Code of the State of California [Cl. Tr. 120]. Accordingly, the Referee made his findings of fact and conclusions of law [Cl. Tr. 89] and entered his order quieting title in Appellees and granting Appellants a lien to secure the debt of $20,500 [Cl. Tr. 145-146].[5]

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[5]The Referee's original order [Cl. Tr. 121], by mistake, fixed the amount of Appellants' debt secured by the lien at $12,-842.47. This order was corrected by a *nunc pro tunc* order entered prior to the affirmance on review by the district judge [Cl. Tr. 145].

On March 1, 1966, the district court determined that the Referee's findings of fact were not clearly erroneous, his conclusions of law were correct, and affirmed the Referee's order and denied Appellants' petition for review [Cl. Tr. 151-152].

SUMMARY OF ARGUMENT.

On the merits, Appellees are entitled to affirmance on any of three independent legal theories: *First,* California law is well-settled that a deed can always be proved to be a mortgage. Here, the Referee found that evidence "unequivocal, clear and convincing" that the deed from Appellees to Appellants was in fact a mortgage. That finding is not clearly erroneous. It is supported by a compelling preponderance of the evidence, including the fact that, while Appellees' equity in the property was $380,000, the alleged "purchase" price was only $20,500. Appellants opposed this overwhelming proof with only the deed, a written statement that the deed was not intended to be a mortgage, and the testimony of one of the Appellants. California gives the deed and estoppel statement no legal weight, in the face of substantial evidence to the contrary, and the witness was so thoroughly impeached that the Referee found Appellants' claim had "no real or substantial merit". *Second,* the Referee's finding that Appellees complied with the terms of the option to repurchase was not clearly erroneous. *Third,* even if the deed was absolute, it was voidable under the Bankruptcy Act as a fraudulent transfer.

Further, it is clear that the bankruptcy court had summary jurisdiction to try the merits. Summary jurisdiction extends over real property in the actual possession

of a debtor at the time of the filing of a Chapter XI petition. The Referee found that Appellees were in actual possession of the west one-half of the Katella property when these proceedings were instituted. That finding is not clearly erroneous but is supported by numerous acts of possession. Moreover, even if Appellants were in actual possession of the property, they were not bona fide adverse claimants because they totally failed to demonstrate any arguable factual basis for their claim, which the Referee found had "no real or substantial merit, is not bona fide, and there can be no fair doubt or any reasonable room for controversy to the contrary". In addition, the grant of jurisdiction in Chapter XI proceedings extends to any property owned by the debtor, whether or not he is in possession.

The remainder of Appellants' arguments are likewise without merit. Contrary to Appellants' claims, they were given ample opportunity to produce evidence on jurisdiction and on the merits, although they chose not to do so. Appellants' argument that the bankruptcy court should have surrendered its jurisdiction to the state court ignores the plain command of the Supreme Court that abstention is called for only when state law is unsettled. Here, California law is well-settled that a deed can always be proved to be a mortgage. Finally, the relief sought by Appellees is not barred by any equitable principle of "unclean hands". Appellees instituted this action as debtors-in-possession for the benefit of their creditors. Moreover, Appellants cannot demonstrate that they themselves were adversely affected by Appellees' alleged misconduct. The judgment is right and correct.

ARGUMENT.

I.

Appellees Are Entitled to Judgment on the Merits.

The lower court's judgment quieting title to the west one-half of the Katella property is supportable on three independent legal theories: (1) The transaction between the parties was nothing more than a disguised security transaction and the deed was in fact a mortgage; (2) The option to repurchase was timely and properly exercised; and (3) the transaction, if a conveyance, was a voidable fraudulent transfer under the Bankruptcy Act and California law. The Referee in Bankruptcy made findings of fact which support judgment for Appellees on each theory. Those findings are not clearly erroneous[6] and the judgment is correct.

A. The Referee's Finding of Fact That the Deed Was in Fact a Mortgage Is Not Clearly Erroneous.

One of the bases for the lower court's judgment quieting title to the subject property in Appellees was the Referee's finding that it was the mutual intention of the parties that the deed was in fact a mortgage [Cl. Tr. 119]. The Referee found [Cl. Tr. 116]:

> "The evidence is unequivocal, clear and convincing that it was the mutual intention of all parties that the instrument in the form of a deed, dated September 23, 1963, purporting to convey to [Appellants] the west one-half of the Katella prop-

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[6]Appellants urge an erroneous standard for appellate review of the Referee's findings of fact. Appellants argue that they are entitled to judgment on the merits because the Referee's decision "is not supported by the evidence" (App. Op. Br. p. 24). But this court cannot reverse the Referee's findings unless they are "clearly erroneous." General Order in Bankruptcy No. 47; Fed. R. Civ. P. 52(a).

erty and the option instrument were nothing more than a disguised security transaction and a mortgage."

The law in California is firmly settled that a deed, absolute on its face, can always be proved to be a mortgage in fact. Section 2925 of the California Civil Code provides in part:

> "The fact that a transfer was made subject to defeasance on a condition, may, for the purpose of showing such transfer to be a mortgage, be proved . . . though the fact does not appear by the terms of the instrument."

And if the deed is transferred ". . . as a security for the performance of another act, [it] is to be deemed a mortgage, . . ." Cal. Civ. Code §2924.

No matter what form the transaction takes, the California courts will pierce the form of the documents to determine the true intention of the parties. *Beeler v. American Trust Co.*, 24 Cal. 2d 1, 147 P. 2d 583 (1944). In *Beeler* the court clearly stated the rule (24 Cal. 2d at 21, 147 P. 2d at 594):

> "In *Vance v. Anderson*, 113 Cal. 532, 538 [45 P. 816] this court set forth the basic doctrine as follows: 'A deed absolute on its face may be shown, by parol, to be intended as a mortgage. It may be stated, as a general proposition, that in this state, at least, every conveyance of real property made as security for the performance of an obligation is, in equity, a mortgage, irrespective of the form in which it is made. Equity looks beyond the mere form in which the transaction is clothed, and shapes its relief in such a way as to carry out the true in-

> tention of the parties to the agreement, ...'To insist on what was really a mortgage, as a sale, is in equity a fraud *which cannot be successfully practiced under the shelter of any written papers, however precise and complete they may appear to be.'* "

Whether a deed was given only for security must be determined from the intention of the parties by looking into all of the facts and circumstances of the transaction, *Beeler v. American Trust Co., supra,* and this determination is for the trial court.[7] *Greene v. Colburn,* 160 Cal. App. 2d 355, 325 P. 2d 148 (1958).

The Referee's finding that the deed was in fact a mortgage cannot be set aside unless it is "clearly erroneous." General Order in Bankruptcy No. 47; Fed. R. Civ. P. 52(a). An appellate court will not reverse a finding of fact unless "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.,* 333 U.S. 364, 395, 68 S. Ct. 525, 542 (1948). And in reviewing findings of fact, the appellate courts are instructed that "due regard

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[7]Appellants' reliance upon *Workmon Constr. Co. v. Weirick,* 223 Cal. App. 2d 487, 36 Cal. Rptr. 17 (1963) is misplaced. In *Workmon* the appellate court simply affirmed the trial court's finding that the deed was not a mortgage because the evidence was conflicting and could not be reevaluated by the reviewing court. Appellants' assertion that the facts in *Workmon* are "very similar to the present facts" is misleading. Among other things the court in *Workmon* pointed out that one of the parties who sought to declare the deed a mortgage was an attorney highly experienced in real estate transactions, while the holder of the deed had not been represented by counsel. The court further pointed out that there was no real evidence of a subsisting debt and that there was a private written agreement among the plaintiffs that negated a mortgage. As the court pointed out, each case must be judged on its own facts because "each turns upon the parol evidence peculiar to the particular case." *Workmon Constr. Co. v. Weirick, supra,* 223 Cal. App. 2d at 491, 36 Cal. Rptr. at 20.

shall be given to the opportunity of the trial court to judge of the credibility of witnesses." Fed. R. Civ. P. 52(a). Accordingly, when a finding of fact "is based upon conflicting evidence, or where the credibility of witnesses is a factor, a district court and, on appeal, a court of appeals will seldom hold such a finding clearly erroneous." *Costello v. Fazio,* 256 F. 2d 903, 908 (9th Cir. 1958). *Accord: Olympic Finance Co. v. Thyret,* 337 F. 2d 62 (9th Cir. 1964); *Hoppe v. Rittenhouse,* 279 F. 2d 3 (9th Cir. 1960); *Grace Bros., Inc. v. Commissioner of Internal Revenue,* 173 F. 2d 170, 174 (9th Cir. 1949). See 5 Moore, Federal Practice, ¶52.03[1], p. 2615 (2d Ed. 1953).

A brief review of the evidence clearly demonstrates that the Referee's finding that the deed and option to repurchase constituted a disguised security transaction is not clearly erroneous, but, on the contrary, is supported by "unequivocal, clear and convincing" evidence [Cl. Tr. 116].

From July 31, 1963 (the date of the foreclosure sale of the Lot 8 apartment house) [Cl. Tr. 98] to September 12, 1963, the parties were negotiating a security transaction. As early as August 15th Kapelus had agreed to have Crenshaw reconvey Lot 8 in exchange for a deed of trust covering both Lot 8 and the west one-half of the Katella property [Cl. Tr. 98] to secure the debt of $15,000. In fact, Kapelus prepared the quitclaim deed to Lot 8 on August 15th and had it acknowledged by Crenshaw on that day [Cl. Tr. 101]. On August 26, 1963, when escrow No. 6363-RB was opened at United Title Guaranty Company, escrow instructions were prepared [D-34] calling for a note of $15,000 at 8% interest *secured by a deed of trust* on

the west one-half of the Katella property and Lot 8, and for the reconveyance of Lot 8 to Appellees [Cl. Tr. 101, D-34]. Appellees executed the note for $15,000 [Cl. Tr. 102, D-32], signed the escrow instructions [D-34], and executed the deed of trust on Lot 8 and the west one-half of the Katella property [Cl. Tr. 102].[8]

After receiving his copies of the escrow instructions on August 27, 1963 [Cl. Tr. 102], Kapelus instructed the escrow officer to draw a series of amendments to the escrow instructions. Kapelus demanded that the note be raised from $15,000 to $20,500, that it bear interest at 10% rather than 8%, that Appellees obtain a policy of title insurance for $20,500, that Appellees pay the August rents on Lot 8 through escrow [Cl. Tr. 102], and that Appellees pay all escrow and title insurance costs [Cl. Tr. 104]. Those amendments were drawn [Cl. Tr. 104, D-92, D-89] and Appellees executed the necessary documents [Cl. Tr. 103-104].

There can be no question but that this escrow was a loan transaction. If it had been consummated there would be no controversy before this court.

But then Kapelus insisted that the form of the security transaction be changed to eliminate the possibility of the kind of foreclosure problem he had with Lot 8. Kapelus wanted none of the time, trouble or expense associated with another foreclosure proceeding [R. Tr. 1349]. His motivations were typical.[9]

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[8]Although the documents were actually signed by Reedy, he was merely acting as Appellees' agent [Cl. Tr. 104].

[9]See *In re 716 Third Avenue Holding Corp.*, 340 F. 2d 42, 47 (2d Cir. 1964) where the court stated:

> "There are strong motivations which induce parties to resort to a subterfuge of clothing a mortgage in the guise of

(This footnote is continued on the next page)

As a result of Kapelus' demands, a new escrow (No. 5980-RB), which superseded the previous loan escrow (No. 6363-RB), was opened at United Title Guaranty Company to effect the new agreement [Cl. Tr. 106]. The terms of the new escrow were strikingly similar to the loan escrow: Appellees would get title to Lot 8; Kapelus and Crenshaw would get title to the west one-half of Katella to secure an indebtedness of $20,500; Appellees would pay Crenshaw the August rents on Lot 8; and Appellees would pay all escrow costs and title insurance fees [Cl. Tr. 107-109].

The intention of the parties that the deed was to be security for the $20,500 debt was corroborated by a compelling preponderance of evidence. The debt was not satisfied, was outstanding when the deed was given to Kapelus and Crenshaw, and is still outstanding [Cl. Tr. 109].[10] There had been a history of Appellees' giving Crenshaw deeds of trust as security for the debt: First a blanket deed of trust [Cl. Tr. 94], then a deed of trust on Lot 8, and then a deed of trust on Lot 8 and the west one-half of the Katella property. And the option to repurchase is probative of a security transaction, particularly when Appellees had to exer-

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an outright conveyance. The lender seeks thereby to avoid the time and expense of foreclosure proceedings and the possible loss of a substantial profit while his acquisition of title is delayed by a redemption period fixed by a court and if a borrower is in desperate financial circumstances, he will of necessity accede to the lender's demand; . . ."

[10]Kapelus unsuccessfully attempted to establish at trial that the debt had been satisfied. He testified that he prepared an assignment of the judgment [R. Tr. 997] and mailed it to Albert Barnett for signature and then mailed it to Appellees on December 6, 1963 [R. Tr. 998]. Appellees did not receive the assignment of judgment, and although Albert Barnett, president of Crenshaw, testified at the trial [R. Tr. 1425], he did not testify that he ever saw or signed the assignment. Moreover, no such assignment was ever filed in the Superior Court action [R. Tr. 1001].

cise the option within the equivalent time it took to foreclose under a deed of trust. Appellees paid all escrow costs and title insurance fees on Lot 8 and the west one-half of the Katella property, although it was the custom in Southern California in escrows involving straight trades of property to divide those costs [Cl. Tr. 110]. See, *Workmon Constr. Co. v. Weirick,* 223 Cal. App. 2d 487, 36 Cal. Rptr. 17 (1963).

One of the most important earmarks of a security transaction is a great inequality between the value of the property conveyed and the alleged "price" paid for it. *Beeler v. American Trust Co.,* 24 Cal. 2d 1, 17, 147 P. 2d 583, 595 (1944); *Orlando v. Berns,* 154 Cal. App. 2d 753, 756, 316 P. 2d 705, 707 (1957). Great weight is placed on such disparity because an owner is not likely to sell his property for a price substantially below its market value. As the court stated in *In re 716 Third Avenue Holding Corp.,* 340 F. 2d 42, 46 (2d Cir. 1964):

> "The importance of value in this case is obvious. If there was credible evidence that the leasehold at the time of the assignment had a fair market value of $60,000 or anything in the range of two or three times the sum received by the assignor, it is highly unlikely that the conveyance was understood or intended by the parties to be an outright sale."

In *716 Third Avenue Holding Corp., supra,* property worth $60,000 was conveyed for a consideration of $22,000; in *Beeler, supra,* property worth $135,000 was conveyed for a consideration of $75,000. In the present case property with an equity of about $380,000 was

transferred of record for a consideration of $20,500 [Cl. Tr. 110].[11]

Appellees' overwhelming case establishing that the deed was a mortgage was opposed only by the deed [R-1], the estoppel statement [R-2], and the testimony of attorney Marvin B. Kapelus.

A deed may always be proved to be in fact a mortgage and an estoppel statement has no better standing. In *Beeler v. American Trust Co.,* 24 Cal. 2d 1, 15, 147 P. 2d 583, 591 (1944), a strikingly similar circumstance occurred. There the bank forwarded to plaintiff for his execution a deed of conveyance, bill of sale, and a lease and option agreement. Along with these papers the bank also sent to the plaintiff for signature an affidavit "made particularly for the benefit of the (title company)" certifying the nature of the transaction as an absolute conveyance. The title company demanded the affidavit before it would issue a title policy. In disposing of that affidavit, the court in *Beeler* said (24 Cal. 2d at 22-23, 147 P. 2d at 595):

> "If by a separate writing the parties expressly agree, at the same time an absolute deed is executed, that it is what it purports to be, that is, an absolute sale, that would be no more than what the deed itself says. Therefore, if they could thus avoid its real effect as a mortgage, the true nature of such a transaction could never be shown, and the policy of the law never to permit a security to be converted by *any* contemporaneous agreement into a sale could be constantly evaded."

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[11]See footnote 2, *supra.*

The estoppel statement Appellants rely upon was prepared by officers of the title company for their own benefit[12] [R-2; R. Tr. 1159-1161; Cl. Tr. 106] and they wrote Kapelus that unless it was signed ". . . *this would have to be treated as a deed in lieu of a mortgage and would not be insurable* . . ." (Emphasis supplied) [D-41; R. Tr. 1161-1162].

The Witness Kapelus.

The only testimony Appellants offered was that of the interested party, Kapelus. Only his testimony was offered to support Appellants' contentions that the deed was not a mortgage and that the option was not properly exercised.

It can be stated without any qualification whatsoever that there is no record in any civil litigation where a single witness was more thoroughly impeached than was Kapelus. Although he is a member of the California Bar, Kapelus' testimony was incredibly replete with contradictions, inconsistencies, evasive voluntary statements, faulty recollections, inherently improbable assertions, extravagant claims, and downright misstatements of fact. He was repeatedly contradicted by documentary evidence of the highest probative value and by numerous independent witnesses.

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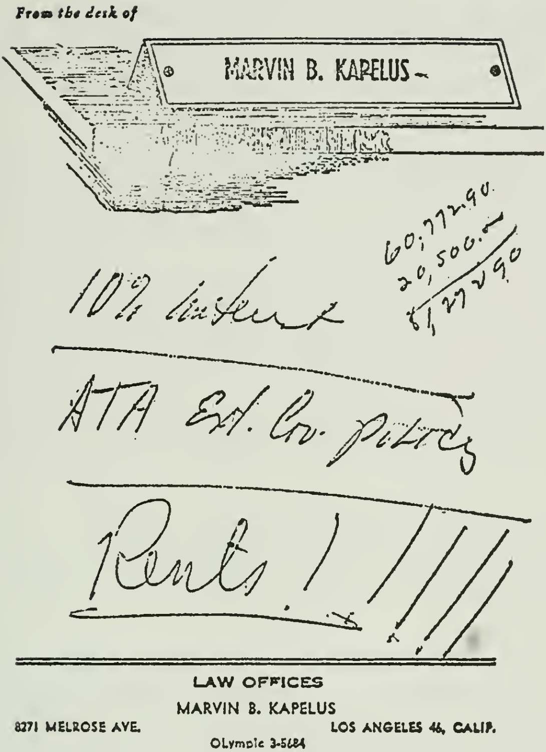
[12]Appellants imply the statement was executed for their benefit (App. Op. Br. pp. 5, 25). But the statement, by its own terms, was "For the benefit of Western Title Insurance Company" [R-2].

Detailed record references to Kapelus' testimony are set forth in the Appendix to Appellees' brief. There the most glaring examples of his impeachment are collected.

When it developed that Kapelus' involvement in loan escrow No. 6363-RB was highly significant evidence of a security transaction, Kapelus denied [R. Tr. 1044-1046] any knowledge of or participation in that escrow (Appendix A). Kapelus claimed [R. Tr. 1044] that there never was any agreement for a note and deed of trust transaction; that he did not give any instructions to the escrow officer concerning that escrow [R. Tr. 1001-1002]; that when he received the August 26, 1963 escrow instructions from the escrow officer he threw them in the "waste paper basket" [R. Tr. 780, 1002]; and he denied signing any documents in connection with that loan escrow [R. Tr. 1046]. Kapelus was impeached by proof of his signature to the cancellation instructions [D-37; R. Tr. 1046].

The most damaging impeachment evidence of all was the memorandum in Kapelus' own handwriting found with the loan escrow papers [D-87] (Appendix A). Three of the amendments to the loan transaction, which Kapelus denied giving instructions about, were the raising of the interest from 8% to 10%, the requirement of an A.T.A. extended coverage policy, and the payment of the August apartment rents on Lot 8 through escrow. The Kapelus memorandum [D-87] contains three notations of significance:



From the desk of

MARVIN B. KAPELUS

60,772.90
20,500.00
81,272.90

10% interest

ATA Ext. Cov. policy

Rents!

LAW OFFICES
MARVIN B. KAPELUS
8271 MELROSE AVE. LOS ANGELES 46, CALIF.
OLympic 3-5684

Each of these terms was embodied in amendments to the loan escrow. Yet Kapelus denied any recollection of making those notes [R. Tr. 1056], and he did not know how the memorandum got into the files of the escrow officer "unless it fell out of another file and out of my briefcase" [R. Tr. 1056]. Moreover, Kapelus testified the memorandum could have related to "any one of a dozen things I have handled" [R. Tr. 1057], even though the escrow officer testified that he, Broussard, wrote the figures "60,772.90, 20,500.00 and 81,272.90" on the memorandum [R. Tr. 1128].

Kapelus denied that he prepared the quitclaim deed to Lot 8. He was promptly impeached by his own secretary and by his own client [R. Tr. 1191, 1436] (Appendix B).

It quickly became apparent that Kapelus' trial testimony was in direct conflict with his deposition testimony. When he became aware of this, Kapelus first insisted his deposition was incorrectly transcribed [R. Tr. 1091, 681]. When the deposition reporter was produced as a witness, Kapelus remembered he had made corrections in the *original* of his deposition. But when the original of his deposition was finally produced, and it contained no corrections, Kapelus then remembered that the corrections had been made in a copy [R. Tr. 1037, 1039]. The copy, with minor changes, was finally produced [D-78]. Kapelus, near the close of trial, found it at the home of his client [R. Tr. 1037] (Appendix C).

Kapelus testified he did not receive Appellees' telegram of December 31, 1963 [R. Tr. 372, 373], then admitted he did receive it [R. Tr. 584, 585]; and, when asked to produce the original, he claimed he had surrendered it at his deposition hearing [R. Tr. 585]. He was promptly impeached by the deposition reporter [R. Tr. 1018, 1019] (Appendix D).

Kapelus claimed he had not instructed his secretary to draw the deed back to Appellees at their meeting in his office on January 21, 1964 [R. Tr. 621]. He was impeached by four different witnesses [R. Tr. 1218, 353, 848, 1313] (Appendix E).

Kapelus claimed that the date in the option agreement was tampered with and altered to read January 26 instead of January 16 [R. Tr. 702-708]. He was

directly impeached by two witnesses and records of the Orange County Recorder [R. Tr. 244, 399, 830, 831; D-104, 105] (Appendix F).

Kapelus claimed he prepared and delivered an assignment of the judgment to Appellees on December 6, 1963 [R. Tr. 997, 1001]. He was impeached by Reedy and Franklin [R. Tr. 969, 370] and by his own deposition testimony [R. Tr. 1512-1513] (Appendix G).

Kapelus claimed that he, not officers of the title company, demanded preparation and execution of the estoppel statement [R. Tr. 1116]. He was impeached by the document itself [R-2, D-100, D-41], by the escrow officer and others [R. Tr. 1158, 1159, 1160] (Appendix H).

Indeed, Kapelus' incredulous story could aptly be described as "standardized forms of falsehood so often reiterated as to be neither credible nor interesting." *In re Abesbaum*, 70 F. 2d 628-629 (2d Cir. 1934). See *Sahn v. Pagano*, 302 F. 2d 629, 632 (2d Cir. 1962). Although an appellate court cannot X-ray through the record to see the additionally convincing element of demeanor, nevertheless it "should not be ignorant as judges of what we know as men." *Watts v. Indiana*, 338 U.S. 49, 52, 69 S. Ct. 1347, 1349 (1949).

B. The Referee's Finding of Fact That Appellees Complied With the Terms of the Option Is Not Clearly Erroneous.

Independent of his conclusion that the deed was a mortgage, the Referee also held that "the debtors complied with the terms of the option . . ." [Cl. Tr. 119] and Appellants' contrary contention had "no real or substantial merit" [Cl. Tr. 116; see Cl. Tr. 112-113].

When Appellees made a timely tender of the option price on January 21, 1964 [Cl. Tr. 112-113], they became entitled to the deed to the property and to the remedy of specific performance to compel delivery. *Elliott v. McCombs,* 17 Cal. 2d 23, 31, 109 P. 2d 329, 334 (1941); *Hersh v. Garou,* 218 Cal. 460, 23 P. 2d 1022 (1933); *O'Connell v. Lampe,* 206 Cal. 282, 274 Pac. 336 (1929); *Estate of Dwyer,* 159 Cal. 664, 115 Pac. 235 (1911).

Appellants take issue with the Referee's findings because, they allege, Appellees "did not make the trust deed payments", "did not pay the taxes when due", and there was something "highly unusual" about the tender of the $20,500 (App. Op. Br. p. 27).

But the Referee found against Appellants on each of these issues on a record free of conflict [Cl. Tr. 112-113].

The Referee's finding that Appellees were not in default with respect to the interest payments on the first deed of trust [Cl. Tr. 112-113] is supported by conclusive evidence. A. L. Rist, husband of the note holder [R. Tr. 856], testified that he deferred payment of the January 1, 1964 interest to April 1, 1964 [R. Tr. 866] and that this extension cured any default [R. Tr. 868].

And the Referee's finding that there was no default with respect to the payment of taxes [Cl. Tr. 113] is correct. Although Appellants claim the taxes were not paid "*when due*" (App. Op. Br. p. 27), the only condition of the option was that the taxes were not to become "*delinquent*" [D-33; Cl. Tr. 113]. A Deputy Clerk in the Orange County Tax Collector's office testified that the taxes on the west one-half of the Katella

property did not become delinquent until January 26, 1964, five days after the tender on January 21, 1964 [R. Tr. 900]. Appellants' record reference (App. Op. Br. p. 27) simply establishes that the taxes could have been paid earlier—but they were not delinquent on the date of the tender. Moreover, Appellees paid, in cash, both the first and second installments on the west one-half of the property on February 10, 1964 [R. Tr. 900-901].

Finally, the Referee found that the option price was tendered to Appellants on January 21, 1964 by a certified check which was "the equivalent of cash and would have been honored by the issuing bank if presented to that bank by Kapelus or Crenshaw" [Cl. Tr. 113]. The check was introduced into evidence and clearly is "certified" [D-49]. An employee of the certifying bank, Bank of America, West Anaheim Branch, testified that the bank's certification of the check was "irrevocable" and when presented to the bank, it would have been paid [R. Tr. 547]. Appellants nevertheless imply that the tender was somehow defective because it was "highly unusual" and involved "trust funds" held by an escrow company. But the escrow clerk who handed the certified check to Kapelus [R. Tr. 1215] testified [R. Tr. 1226] that she personally talked to the person who had deposited the funds with the escrow company, and that person authorized the use of those funds to obtain the deed [Cl. Tr. 1226].

C. If the Deed Is Not a Mortgage, It Is Voidable as a Fraudulent Conveyance.

Appellees do not even specify as error the Referee's alternative holding that the deed, if it was not a mortgage, was a voidable fraudulent conveyance [Cl. Tr. 129]. Yet this ground alone is sufficient to sustain judgment for Appellees.

The Bankruptcy Act grants a debtor-in-possession[13] the power to avoid transfers which are made for less than fair consideration when the transferor is, or will be rendered, insolvent. Section 67d(2)(a) provides, in pertinent part:

> "Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; . . ."

Every element of a fraudulent transfer was established at trial and found present by the Referee. The consideration for the transfer of the west one-half of the Katella property, if not a mortgage, had to be the satisfaction of the indebtedness of $20,500, yet the property transferred had a net fair market value to the

[13]Section 342 of Chapter XI of the Bankruptcy Act vests in the debtor-in-possession the avoiding powers of a trustee in bankruptcy. Section 342 provides: "Where no receiver or trustee is appointed the debtor shall continue in possession of his property and shall have all the title and exercise all the powers of a trustee appointed under this Act . . ." Among such powers granted to the debtor-in-possession is the power to avoid fraudulent transfers under Section 67d. 4 Collier, On Bankruptcy, ¶67.29, pp. 330-332 (14th Ed. 1964).

debtors of $380,000.[14] Accordingly, the Referee found that: "The value of [Appellees'] interest in the west one-half of the Katella property was far in excess of the debt to Crenshaw and Kapelus and if the deed were an absolute conveyance, then it would not have been supported by fair consideration" [Cl. Tr. 115]. The Referee also found that the transfer, if absolute, would have rendered Appellees insolvent [Cl. Tr. 115].

Since the Referee also found that there were creditors in existence at the time of the transfer who had claims provable under the Bankruptcy Act [Cl. Tr. 115], he correctly concluded that an absolute transfer of the property would have been voidable by Appellees on behalf of their creditors [Cl. Tr. 120].

II.

The Bankruptcy Court Had Summary Jurisdiction to Quiet Title to the Katella Property.

A. Actual Possession of Real Property Supports Summary Jurisdiction and the Referee's Finding of Fact That Appellees Were in Actual Possession Is Not Clearly Erroneous.

No principle of bankruptcy law is more clearly settled than that "bankruptcy courts have summary jurisdiction to adjudicate controversies relating to property over which they have actual . . . possession." *Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478, 480, 60 S. Ct. 628, 629 (1940). Contrary to Appellants' contention that actual possession is only a basis of jurisdiction when dealing with *personal property* (App. Op. Br. p.

[14]The Referee found that the west one-half of the Katella property had a gross value of $464,000 [Cl. Tr. 110]. This property was subject to a first deed of trust of $84,000 [Cl. Tr. 100].

13), it is clearly established that actual possession of *real property* at the time of the filing of the petition in bankruptcy is an adequate basis for summary jurisdiction. *Thompson v. Magnolia Petroleum, supra; In re J. Rosen & Sons, Inc.,* 130 F. 2d 81 (3rd Cir. 1942); *City of Long Beach v. Metcalf,* 103 F. 2d 483 (9th Cir. 1939). And contrary to Appellants' suggestion (App. Op. Br. p. 11),[15] the fact that record title is in a stranger does not deprive the bankruptcy court of jurisdiction over real property. *Thompson v. Magnolia Petroleum, supra; Robinson v. Mann,* 339 F. 2d 547 (5th Cir. 1964); *White v. Barnard,* 29 F. 2d 510 (1st Cir. 1928).

The Referee found that Appellees were in actual possession of the west one-half of the Katella property on the date they filed their Chapter XI petition [Cl.

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[15]The authorities cited by Appellants in support of their contention that the bankruptcy court can never acquire jurisdiction over real property when record title is in a stranger (App. Op. Br. pp. 11-12) are either not in point or simply contrary to well-established doctrines of summary jurisdiction. The quotation from Collier On Bankruptcy that "a record owner of real property not a party to the bankruptcy proceedings. cannot be brought within the bankruptcy court's jurisdiction" is from a footnote to the following statement in the text (2 Collier, On Bankruptcy, ¶23.06[1], p. 494 (14th ed. 1964)): "The question 'who are adverse claimants' becomes one of primary importance *where the property is in the possession of other than the bankrupts*" (Emphasis supplied). *Wight v. Street,* 63 F. 2d 80 (9th Cir. 1933), *Kaplan v. Guttman,* 217 F. 2d 481, 484 (9th Cir. 1954), and *In re Graceland,* 73 F. Supp. 158 (S.D. Cal. 1947) were all cases in which the court held that neither the trustee in bankruptcy nor the bankrupt were in actual possession of the real property. *In re Blackbear Products Co.,* 56 F. 2d 243 (W.D. Wash. 1931) and *In re Mimms & Parham,* 193 Fed. 276 (W.D. Ky. 1912) are simply two district court cases which are against the great weight of authority, and *Mimms & Parham, supra,* has been characterized as "at variance with the established doctrines placing great stress on the test of possession in bankruptcy court through its officer rather than legal" possession through title. 2 Collier On Bankruptcy, ¶24.05[2] p. 374, n. 10. (14th ed. 1966).

Tr. 109, 114]. The district court held this finding of fact was "not clearly erroneous" [Cl. Tr. 151-152].

The determination of who is in actual possession is a question for the trier of fact. *In re Christ's Church of The Golden Rule*, 79 F. Supp. 46, 47 (N.D. Cal. 1948); *Bullock v. Rouse*, 81 Cal. 590, 596, 22 Pac. 919, 920 (1889); *Clay v. Saute*, 140 Cal. App. 2d 681, 295 P. 2d 914 (1956). And an appellate court will not reverse these findings unless they are "clearly erroneous". General Order in Bankruptcy No. 47; Fed. R. Civ. P., 52(a).

Appellees clearly were in actual possession of the entire Katella property prior to the transfer to Kapelus and Crenshaw on September 23, 1963. The Katella property was an orange grove when Appellees purchased it in 1961 [Cl. Tr. 99-100] and Appellees cultivated the property and sold the orange crop [R. Tr. 392-393]. In April, 1963, Appellees cleared part of the orange grove [R. Tr. 393-395] in preparation for building a motel or apartment on the property [R. Tr. 414-415, 1282]. Lenders periodically were taken on the property to obtain refinancing [R. Tr. 382-384, 446-447]. There is no dispute over this proof, and, in fact, Appellants actually stipulated in the state court action that Appellees "were the owners and in exclusive possession of the subject real property on or about September 23, 1963" [Cl. Tr. 10].

Appellants dispute the fact that Appellees were in possession of the west one-half of the Katella property after the record conveyance to Appellants on September 23, 1963.[16] Appellants rely solely upon Kapelus' testi-

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[16]Appellants argue (App. Op. Br. p. 13) that because the Katella property was unimproved and uninhabited it was "not

(This footnote is continued on the next page)

mony that he made payments to the holder of the first deed of trust, authorized potential purchasers to go on the property, and attended city council planning commission hearings (App. Op. Br. p. 17). Appellees likewise pointed to their payments to the holder of the first deed of trust [R. Tr. 324, 345-346] and their taking potential purchasers on the property [R. Tr. 416, 809]. But, in addition, Appellees proved they paid all taxes on the west one-half of the property for the entire tax year 1963-1964 [R. Tr. 901], and never intended to surrender possession [R. Tr. 398, 833-834].

The Referee was required to resolve this conflict in the evidence. *In re Christ's Church of the Golden Rule,* 79 F. Supp. 42 (N.D. Cal. 1948). He did so and he found that Appellees remained in actual possession of the property after the execution of the deed and were in actual possession of the property when the Chapter XI proceedings were filed [Cl. Tr. 109, 114].

There was ample evidence to support the Referee's finding that Appellees remained in actual possession of the west one-half of the Katella property after September 23, 1963.[17] After the conveyance to Kapelus

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susceptible to actual physical possession". But appellants stipulated in the state court action that Appellees "were the owners and in exclusive possession of the subject real property on September 23, 1963" [Cl. Tr. 10]. Moreover, the California law is clear that the kind and extent of the evidence necessary to sustain a finding of actual possession depends upon the "use appropriate to the location and character of the property, each case resting upon its own peculiar facts." *Posey v. Bay Point Realty Co.*, 214 Cal. 708, 712, 7 P. 2d 1020 (1932). See, *Clay v. Saute*, 140 Cal. App. 2d 681, 295 P. 2d 914 (1956); *Goodrich v. Mortimer*, 44 Cal. App. 576, 186 Pac. 844 (1919).

[17]It is clear Appellees remained in actual possession of the east one-half of the property as well. Appellees continued to store trash cans from their motels on the east one-half until February, 1964 [R. Tr. 399], and they kept motel signs and flags on the property [R. Tr. 402].

and Crenshaw. Appellees and their agents physically set foot on the property to show it to prospective lenders [R. Tr. 404, 416, 809, 1791] and authorized lenders, engineers and appraisers to go on the property [R. Tr. 416, 809]. After the conveyance to Appellants, Appellees physically set foot on the west one-half of the property and removed an advertising sign of the Samoa Motel [R. Tr. 402-403] and caused Melodyland Theatre to take down one of its signs on the property [R. Tr. 404]. After the conveyance to Appellants, the City of Anaheim removed orange trees from the west one-half of the property and in February, 1964, sent Appellees a bill for $2,587 for the removal [D-62]. In October or November, 1963, Appellees discovered that two or three feet of water had gathered on the property and was attracting children. Although Appellees instructed their agent, Reedy, to call their grading contractor, Mr. Main, to correct the level of the property previously excavated by him, no work was done [R. Tr. 806-808]. After the deed, Appellees paid $1,387 in cash to the holder of the first deed of trust on the west one-half of the Katella property [R. Tr. 324, D-44] and on October 12, 1963 Appellees made another payment of about $1,700 [R. Tr. 345-346]. In February, 1964, after Kapelus had refused the tender under the option agreement, Appellees paid, with cash, all taxes on the west one-half of the Katella property for the entire tax year 1963-1964 [R. Tr. 901]. In May of 1964 Appellees entered into an escrow to sell the west one-half of the Katella property. The escrow instructions that were drawn authorized soil tests on the property [D-64] and Kapelus knew it [R. Tr. 1484]. And finally, as a condition for getting a conditional use per-

mit from the City of Anaheim, the City wrote Appellees, in September, 1964 (after the Chapter XI proceedings were filed) that Appellees [D-117] would have to pay a street lighting assessment for the entire Katella property [D-117; R. Tr. 1490].[18] Kapelus knew of this assessment against Appellees when it was made, and he knew it covered both the west and east halves of the Katella property [R. Tr. 1488-1491].

Just as probative as the physical acts of possession was the clear intention of the parties that Appellees were to remain in possession after the execution of the deed. Appellees and Kapelus had been involved in complex real property transactions for over a year before the conveyance to Appellants, and in none of the transactions had Appellees ever surrendered possession to Appellants. On July 31, 1963, Appellants (as beneficiaries) bid in Lot 8 at foreclosure sale [Cl. Tr. 96-97]. Nevertheless, Appellees remained in actual possession of Lot 8 after the transfer to Appellants and continued to collect the rents on the apartment building [Cl. Tr. 99; R. Tr. 78-79, 286]. When it came to the Katella transaction, it was Appellees' intention never to surrender possession, and they were not asked to surrender possession [R. Tr. 62, 363, 398, 833-834]. As a result, the Referee found that it was the mutual intention of both parties that Appellees were to remain in possession of the west one-half of the Katella property following the deed to Appellants [Cl. Tr. 109].

The Referee was justified in his view that, although the evidence was conflicting, ". . . it is a clear prepon-

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[18]The bill from the City of Anaheim assessed 336 front feet [D-117]. This was the front footage of both the west and east halves of the Katella property [R. Tr. 1490].

derance in favor of the debtors in actual possession"[19] [R. Tr. 1919]. Certainly part of the Referee's task was to weigh the credibility of the witnesses. The Referee considered the conflicting evidence, and since the credibility of witnesses is involved, the Referee's finding of actual possession should not be disturbed on appeal. *Jue v. Bass,* 299 F. 2d 374 (9th Cir. 1962). And this is especially true when the Referee's findings of fact have been also affirmed by the district court on review. *Minella v. Phillips,* 245 F. 2d 687 (5th Cir. 1957); *Arnold v. King,* 236 F. 2d 877 (9th Cir. 1956); *Monson v. Hibler,* 24 F. 2d 909 (9th Cir. 1928).

B. Appellants' Claim of Ownership Was Merely Colorable and They Were Not Bona Fide Adverse Claimants.

Actual possession is not the only basis for invoking the summary jurisdiction of the bankruptcy court. Even if third parties are in possession of the bankrupt's property, the court has jurisdiction over it under the doctrine of constructive possession if the adverse claim of the third party is no more than colorable. *Harrison v. Chamberlin,* 271 U.S. 191, 46 S. Ct. 467 (1926), reaffirmed by the court in *Cline v. Kaplan,* 323 U.S. 97, 65 S. Ct. 155 (1944). Since the mere assertion of an adverse claim does not oust the bankruptcy court of jurisdiction, *May v. Henderson,* 268 U.S. 111, 45 S. Ct. 456 (1925), the bankruptcy court should "enter upon

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[19]Thus Appellees carried their burden of proving they were in actual possession of the west one-half of the Katella property, and overcame any contrary presumption that might be raised by Section 321 of the California Code of Civil Procedure. Although Appellants stress this statute (App. Op. Br. p. 14) they fail to point out that it deals with acquiring title by adverse possession, and, moreover, a party can invoke the statute only after first ". . . establishing a legal title to the property. . . ." Cal. Code of Civ. Proc., §321.

a preliminary inquiry to determine whether the adverse claim is real and substantial or merely colorable." *Harrison v. Chamberlin, supra,* 271 U.S. at 194, 46 S. Ct. at 468.

The standard for determining whether the adverse claim is substantial was succinctly stated in *Harrison v. Chamberlin, supra,* 271 U.S. at 195, 46 S. Ct. at 469:

> ". . . we are of opinion that it is to be deemed of a substantial character when the claimant's contention 'discloses a contested matter of right, involving some fair doubt and reasonable room for controversy' . . . in matters either of fact or law; and is not to be held merely colorable unless the preliminary inquiry shows that it is so unsubstantial and obviously insufficient, either in fact or law, as to be plainly without color of merit, and a mere pretense."

The mere assertion of an adverse claim by a stranger in possession is not enough to defeat the bankruptcy court's jurisdiction. The adverse claimant must make some showing as to the bona fides of his claim.

> "Of course he need not prove the basis for his claim to the point where he obtains a favorable adjudication of it. But he certainly must go far enough to show, first, that there is an arguable factual basis for the claim, and, second, that on such factual basis there is some plausible ground for thinking that the law will afford redress." *American Mannex Corporation v. Huffstutler,* 329 F. 2d 449, 454 (5th Cir. 1964).

When the adverse claimant fails to demonstrate both an arguable factual basis for his claim and some plausible ground for believing the law will grant redress, the status of his claim does not advance beyond the merely colorable level. *Kyle v. Stewart,* 360 F. 2d 753 (5th Cir. 1966).

The Referee evaluated the adverse claim of Appellees and he concluded it was merely colorable. On evidence that he found to be "unequivocal, clear and convincing," the Referee found that the deed and option to purchase "were nothing more than a disguised security transaction and a mortgage" and Appellants' claim that it was not "has no real or substantial merit, is not bona fide, and there can be no fair doubt or any reasonable room for controversy to the contrary" [Cl. Tr. 116]. With respect to Appellants' claim that the option was not properly exercised, the Referee found, again on evidence that was "unequivocal, clear and convincing", that the claim "has no real or substantial merit, is not bona fide, and there can be no fair doubt or any reasonable room for controversy to the contrary" [Cl. Tr. 116].

These findings, affirmed by the district court, are not clearly erroneous. No trier of fact in any jurisdiction, whether court or jury, could reach any other conclusion but that the deed and option constituted a security transaction, the form of which Kapelus dictated. Kapelus' testimony certainly could not elevate Appellants to the dignity of substantial adverse claimants. Indeed, many courts have echoed Judge Clark's view that the bankruptcy court's jurisdiction cannot be defeated by "the claimant's own testimony alone, when it is disbelieved by the Referee." *Matter of Meiselman,* 105 F. 2d 995 (2d Cir. 1939). See *Sahn v. Pagano,*

302 F. 2d 629 (2nd Cir. 1962); *Shaw v. Thompson*, 184 F. 2d 572 (5th Cir. 1950).

Appellants incorrectly suggest (App. Op. Br. p. 10) that this Circuit, in *Suhl v. Bumb*, 348 F. 2d 869 (9th Cir. 1965), adopted a different rule with respect to the bankruptcy court's duty to determine the substantiality of an adverse claim. Appellees do not question the correctness of that decision. *Suhl* correctly rejects constructive possession as a basis of summary jurisdiction "where the property in question is a money claim against third parties rather than a physical asset alleged to be part of the bankrupt's estate." *Suhl v. Bumb, supra*, 348 F. 2d at 782. But *Suhl* expressly recognizes that where the subject of the bankruptcy court's jurisdiction is a physical piece of property—the Katella property—and not an *in personam* action for a money judgment (like in *Suhl*)—summary jurisdiction is proper. *Soverio v. Franklin National Bank of Long Island*, 328 F. 2d 446 (2nd Cir. 1964); *Lindsay-Robinson & Company v. Grady*, 282 F. 2d 607 (4th Cir. 1960); *In re Rock Springs Water Co.*, 140 F. 2d 566 (3rd Cir. 1944); *Head v. Brainard*, 5 F. 2d 289 (9th Cir. 1925).

C. Appellees' Ownership of the Katella Property Serves as a Sufficient Jurisdictional Basis in Chapter XI Proceedings.

The Bankruptcy Act grants the bankruptcy court broader jurisdiction in Chapter XI proceedings than in straight bankruptcies. Section 311 of the Act provides:

> "Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purpose of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located."

While actual or constructive possession is necessary for jurisdiction in straight bankruptcy, in Chapter XI proceedings "*either ownership* in the debtor at [the time the] petition is filed, *or possession* of the court is a basis for summary jurisdiction over controversies" (Emphasis supplied). 8 Collier On Bankruptcy, ¶3.02, p. 181 (14th ed. 1966).

The facts of this case satisfy this ownership requirement in two ways: First, because—as found by the Referee and affirmed by the district court—the deed was in fact a mortgage. Second, having exercised the option before these proceedings began, Appellees became the equitable owners, leaving Appellants with only bare legal title to secure the purchase price. *Elliot v. McCombs,* 17 Cal. 2d 23, 109 P. 2d 329 (1941); *Estate of Dwyer,* 159 Cal. 664, 115 Pac. 235 (1911).

III.

The Referee Gave Appellants Ample Opportunity to Present Their Evidence on Jurisdiction and on the Merits.

Although Appellants do not complain of a single evidentiary ruling, nevertheless, throughout their brief they intimate there was something unfair about the way the case was tried. Appellants, in their brief, complain about the courtroom facilities (p. 19), the lack of a clerk (p. 20), the order of proof (pp. 9-10), and the Referee's refusal to advise Appellants' counsel "what factual issues the Referee thought needed to be determined" (p. 28).

The issue of summary jurisdiction was fairly tried and Appellants were afforded every opportunity to present their evidence. Appellants' trial tactics were to in-

troduce the deed, the estoppel statement, and brief testimony from Kapelus, and then demand that the Referee rule on summary jurisdiction because of Appellants' contention that no one could have actual possession of the Katella property. Although the Referee was prepared to rule on summary jurisdiction the fourth day of trial, he preferred to hear further evidence [R. Tr. 413, 414]. Counsel complied with the Referee's suggestion and by Wednesday, January 6, 1965, Appellees were prepared to rest on the jurisdictional question [R. Tr. 1404]. Appellant's counsel then advised that he had "one additional question" for Kapelus on rebuttal and would then be ready to have the jurisdiction issue decided [R. Tr. 1404-1405]. The Referee then asked counsel to argue summary jurisdiction on Tuesday, January 12th, and advised Appellants that: "You can then elect your next procedure as far as putting on additional evidence, if we find it necessary to go forward and hear your side of the case on the merits." Appellants' counsel responded: "I think I understand how Your Honor intends to proceed" [R. Tr. 1406]. The following day, Thursday, Appellants' counsel produced Kapelus in rebuttal on the jurisdictional question [R. Tr. 1479]. The Referee then asked if Appellants were "prepared to put on more evidence" on the jurisdiction issue [R. Tr. 1499]. Appellants stated they had no further evidence on jurisdiction [R. Tr. 1500-1502].

In light of the record it is difficult to see how Appellants can even make the argument that "they were prevented from submitting evidence on the case in chief" (App. Op. Br. p. 27). At the conclusion of the argument on summary jurisdiction the Referee asked Appellants if they were prepared to proceed on the merits

[R. Tr. 1705-1706]. Appellants' counsel had previously advised the court that they had substantial evidence to produce on the merits and had stated to the court [R. Tr. 1502-1503]:

> ". . . if we were to litigate the matter on its merits then of course there are probably a great number of witnesses we would want to call. . . . There I am thinking of the escrow company appraiser, people from the Independent Bank, trust deed holders who have dealt with Mr. Franklin, we are thinking of a great amount of evidence on the issues in chief that we would want to get into our case."

Appellants' counsel then asked for a week's continuance in the trial, to Monday, January 18 [R. Tr. 1705-1706, 1710], so that he could prepare his case on the merits. But on Monday, January 18, 1965 [R. Tr. 1712] Appellants were *not ready* and suggested that they thought Appellees should first go forward and present Appellees' evidence on the fraudulent conveyance issue [R. Tr. 1713, 1714, 1717]. Appellees and the Referee accommodated, and when Appellees concluded their proof, the Referee again asked Appellants to proceed with their proof [R. Tr. 1832]. Appellants again declined "to submit any other evidence" [R. Tr. 1832], although the Referee reminded Appellants' counsel [R. Tr. 1833]:

> "We certainly did not intend to foreclose any other evidence that you wish to present.
>
> "As a matter of fact we asked for it many, many times. We mentioned at the last hearing that you might bring in an appraiser and the title people and a host of others."

IV.

The Bankruptcy Court Did Not Abuse Its Discretion in Refusing to Surrender Its Jurisdiction to the State Court.

The limited instances in which the bankruptcy court should surrender its exclusive jurisdiction over the affairs and property of the bankrupt are well defined. When the decision before the bankruptcy court requires the application of state rules of law that are uncertain and not settled, the parties should repair to the state court so that rights in local property are not determined "by the accident of federal jurisdiction." *Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478, 484, 60 S. Ct. 628, 631 (1940). Accordingly, when the decision of the bankruptcy court depends upon resolving an unsettled question of state property law, the bankruptcy court should surrender its jurisdiction to the state court. *First National Bank of White River Jct. v. Reed,* 306 F. 2d 481 (2d Cir. 1962). But when the state law is well settled and free of uncertainty, then it is improper for the bankruptcy court to refer the controversy to the state court. *Marian Corp. v. Bray,* 235 F. 2d 318 (4th Cir. 1956); *In re Fine Arts Corp.,* 136 F. 2d 28 (6th Cir. 1943); *In re J. Rosen & Sons, Inc.,* 130 F. 2d 81 (3rd Cir. 1942); *In re Chicago and N.W.R. Co.,* 127 F. 2d 1001 (7th Cir. 1942). See, 1 Collier, On Bankruptcy, ¶2.07, pp. 162-163 (14th ed. 1966).

Tested by these standards it is clear the Referee did not abuse his discretion in refusing to surrender jurisdiction. There are no unsettled questions of California law involved. Appellees sought recovery on three alternative grounds: The deed to Appellants was in fact a mortgage; the option was properly exercised; and, the

transfer was voidable as a fraudulent transfer under the Bankruptcy Act. The law has been clear in California for almost a century that a deed can always be proved to be in fact a mortgage. Cal. Civ. Code, §§2924, 2925. The California Courts have uniformly held that ". . . every conveyance of real property made as security for the performance of an obligation is, in equity, a mortgage, irrespective of the form . . . in which the transaction is clothed . . .". *Beeler v. American Trust Co.,* 24 Cal. 2d 1, 21, 147 P. 2d 583, 594 (1944); *Vance v. Anderson,* 113 Cal. 532, 45 Pac. 816 (1896); *Husheon v. Husheon,* 71 Cal. 407, 12 Pac. 410 (1886). California law clearly recognizes the validity of options. *Elliott v. McCombs,* 17 Cal.2d 23, 109 P.2d 329 (1941). And Appellees' fraudulent transfer cause of action is simply based upon the Bankruptcy Act.

The only issues on the merits before the Referee were factual ones: Was it the intention of the parties that the deed was a mortgage; did Appellees comply with the terms of the option; and was the property transferred to Appellants for less than fair consideration at a time when Appellees were insolvent? These are not issues involving such "unsettled questions of state property law", as to require the bankruptcy court to surrender its "exclusive and non-delegable control over the administration of an estate in its possession." *Thompson v. Magnolia Petroleum Co.,* 309 U.S. 478, 484, 60 S. Ct. 628, 630 (1940).

Appellants seem to argue that every controversy involving title to real property should be referred to the state courts for decision and "that the Federal Courts have plainly announced their policy in this regard" (App. Op. Br. pp. 20-23). But the authorities Appellants cite

simply do not support their position. *Thompson v. Magnolia Petroleum, supra,* ordered the controversy resolved in the Illinois courts because the Illinois courts themselves had not determined whether a railroad right of way was an easement or ownership of the fee simple. *Martoff v. Elliott,* 326 F.2d 205 (9th Cir. 1963); *Jackson v. Sports Company of Texas, Inc.*, 278 F.2d 716 (5th Cir. 1960); *Kaplan v. Guttman,* 217 F.2d 481 (9th Cir. 1954); and *In re Graceland,* 73 F.Supp. (S.D. Cal. 1947), all dealt with whether there was summary jurisdiction at all, and not with surrender of jurisdiction under the *Thompson v. Magnolia Petroleum* doctrine. And *Palmer v. Travelers Ins. Co.,* 319 F.2d 296 (5th Cir. 1963) involved an *in personam* action for negligence over which the bankruptcy court clearly had no jurisdiction. Not one of these cases holds, or even suggests, that the bankruptcy court has no jurisdiction to determine title to real property. And for good reason, for *Thompson v. Magnolia Petroleum* expressly holds (309 U.S. at 482, 60 S.Ct. at 630) that ". . . possession of those lands under claim of fee-simple ownership by the railroad and later by the trustee was an adequate basis for the District Court's summary jurisdiction."

Finally, Appellants assert that it would be "grossly unfair" to deprive them of their alleged right to a jury trial on the primary factual issue in the case—the intent of the parties (App. Op. Br. p. 19). However, Appellants previously waived their right to a jury trial on this issue in the state court action [Cl. Tr. 11, 18, 69].[20] Moreover, an action to declare a deed a mort-

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[20]The joint pre-trial statement in the Superior Court action provided that "Jury is Waived" [Cl. Tr. 11] and the pre-

gage is an equitable action in which there is no right at all to a jury trial. *Duda v. Sterling Mfg. Co.*, 178 F.2d 428 (8th Cir. 1949); *Harlan v. Sparks,* 125 F.2d 502 (10th Cir. 1942); *Clyne v. Brock,* 82 Cal. App. 2d 958, 188 P.2d 263 (1947); *Santa Ana Mortgage & Investment Co. v. Kinslow,* 30 Cal. App. 2d 107, 85 P.2d 899 (1938).

V.

The Relief Sought by Appellees Is for the Benefit of Their Creditors and Is Not Barred by Any Equitable Principles.

To permit Appellants to prevail because of the Appellees' alleged misconduct would be to completely ignore that this litigation is being conducted for the benefit of Appellees' creditors. Appellees are seeking to quiet title to the property in their capacity as "debtors-in-possession" under Chapter XI of the Bankruptcy Act. Section 342 of the Act specifically provides that "[w]here no reciever or trustee is appointed, the debtor shall continue in possession of his property and *shall have all the title and exercise all the powers of a trustee appointed under this Act . . .*" (Emphasis added). For all practical purposes, the debtor-in-possession is the trustee in bankruptcy. *In re Wil-Low Cafeterias, Inc.*, 111 F. 2d 83 (2nd Cir. 1940); *Central Hanover Bank & Trust Co. v. President and Directors of Manhattan Co.*, 105 F. 2d 130 (2nd Cir. 1939); *In re Walker*, 93 F. 2d 281 (2nd Cir. 1937). Whereas in a straight bankruptcy it is the trustee who quiets title to

---

trial order set the matter for trial as a "non-jury trial" [Cl. Tr. 18, 69]. Under California law, the entry of a pre-trial order setting a case for non-jury trial constitutes a waiver of a party's right to a jury trial. *Gorden v. Reynolds,* 187 Cal. App. 2d 472, 10 Cal. Rptr. 73 (1960).

property, and recovers fraudulent transfers, in Chapter XI proceedings it is the debtor (when no receiver or trustee is appointed) who brings those actions. It was not Congress' intent in enacting Section 342 to create a nullity—to grant the debtor-in-possession the power to protect his creditors and then to bar creditors from relief because of the debtor's misconduct. To so construe the Bankruptcy Act would mean that Kapelus and Crenshaw would reap a windfall of more than $300,000 while Appellees creditors would suffer an equivalent loss. Indeed, courts of equity have clearly recognized the creditors' interest by permitting an insolvent debtor to set aside fraudulent transfers. Relief is not given out of consideration for the debtor, but for the purpose of protecting his creditors. 2 Pomeroy, Equity Jurisprudence 137, n. 17 (5th ed. 1941).

Furthermore, Appellants failed to demonstrate that they themselves were adversely affected by Appellees' alleged misconduct and this alone is fatal to their "unclean hands" defense. Although Appellants stress Appellees' past conduct, at no point do Appellants demonstrate that *they* were harmed. Pomeroy states:

> "The party to a suit, complaining that his opponent is in court with unclean hands . . . must show that he himself has been injured by such conduct, to justify the application of the principle to the case. The wrong must have been done to the defendant himself, and not to some third party." 2 Pomeroy, Equity Jurisprudence 99 (5th ed., 1941). *Cf., In re Euclid Doan Co.,* 104 F. 2d 712 (6th Cir. 1939).

Conclusion.

For the foregoing reasons, the order of the District Court should be affirmed.

Respectfully submitted,

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Attorneys for Appellees.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

J. Ronald Trost

APPENDICES.

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APPENDIX A

Kapelus Denies Any Participation in Loan Escrow No. 6363RB or Negotiations Looking Toward a Security Transaction on the Katella Property.

Kapelus testified that there was no new security agreement with Appellees after the trustee's sale of Lot 8. Thus he was compelled to claim: That during August, 1963 there was no security agreement looking to a note and deed of trust; that he did not give any instructions in this connection to Broussard (the escrow officer); that he did not discuss the subject with Broussard; that he threw the August 26, 1963 escrow instructions from Broussard in the wastebasket; that he did not draw the August 15 quitclaim deed to Lot 8; that the deed must have been delivered to him from someone else; and that the memorandum (D-87) in his handwriting related to some other transaction.

Kapelus, to extricate himself from involvement in loan escrow No. 6363RB, which contained promissory notes for various amounts and variously dated deeds of trust, testified [R. Tr. 1044-1046]:

> "Q. When you received the escrow instructions . . . you testified you looked at them and immediately threw them in the wastepaper basket? A. Yes.
>
> Q. I believe you also testified that you had nothing further to do with that proposed escrow from that time forward; is that correct? A. That is right.
>
> Q. Is that your testimony today? A. That is my testimony. Wait a minute, I think that if I may expound a little.

Q. Surely. A. I think that at the time we were at United Title Company on the 12th of September I think that Bob Broussard indicated that he wanted something signed to close out the other escrow.

Q. This was on the 12th? A. Yes. . . .

A. I believe that I told him at that time we had not been a party to the escrow so there was nothing for us to sign.

Q. Did you sign anything? A. No.

Q. You didn't sign anything to close out the — A. No. We had not been a party to the escrow so there was no necessity to sign any documents for the purpose of closing it out.

Q. Did you sign any documents at all in connection with that proposed escrow? A. No.

Q. Either on behalf of yourself or Crenshaw Carpet Center? A. No, not that I recall."

He was *promptly* impeached [R. Tr. 1046]:

"Q. I will show you Debtors' 37 and ask you if that is your signature, Mr. Kapelus? A. That is my signature.

Q. What does that document say basically? A. 'Authorize and directed to cancel the above numbered escrow upon execution of these instructions by all parties concerned in said escrow.'

Q. You are authorizing United Title to cancel another escrow.

What is the number of that other escrow? A. 6363RB.

Q. Is that the one we have been referring to as the loan transaction? A. I don't know. If I can see it.

Q. I will show it to you.

In other words you did sign that paper in that escrow? A. Apparently I did."

And he was wrong about the date. He signed the cancellation instructions in the loan escrow 6363RB on September 23, not September 12 [R. Tr. 1047].

It was Appellees' contention that Kapelus tentatively agreed to the terms of the escrow instructions at United Title in their No. 6363RB dated August 26, 1963 (D-34) and that thereafter Kapelus alone changed the terms and dictated instructions to Broussard resulting in the amendments and instruments prepared by Broussard dated August 28, August 29 and September 3.

If Kapelus dictated these increasingly onerous terms, the circumstances would directly involve him in a security transaction rather than a sale or exchange. He denied participation [R. Tr. 1001]:

> "Q. Do you recall testifying that you never gave any instructions to Mr. Broussard at United Title to draw any papers in connection with that escrow? A. That is correct."

Again, Kapelus testified [R. Tr. 1009-1010]:

> "Q. Did you ever call subsequent to the approximate date of August 26 Bob Broussard at United or anyone else at United and instruct him to prepare an amendment to the escrow instructions? A. No. I don't believe I did, no.
>
> Q. You did not? A. Wait a minute. Amendment to these instructions?
>
> Q. Yes. A. No."

Reedy promptly impeached Kapelus [R. Tr. 1251-1254]:

"Q. Mr. Reedy, I want to show you Debtors' Exhibit number 92 which appears to be an instruction or amendment to instructions bearing 8-28-63 which provides that the amount of note and deed of trust shall be $20,500.

My question to you is, did you ever instruct the escrow on or about August 28, 1963, to change the amount of the note from $15,000 to $20,500? A. No, sir.

Q. Did you give any such instruction at any other time in connection with that matter? A. No, sir.

Q. I will show you Debtors' Exhibit 93 which appears to be an amendment to escrow instructions bearing date 8-29-63. I will ask you if on or about that date you gave any instructions into the escrow changing the rate of interest to 10 percent per annum? A. No, sir.

Q. Or did you on any other date? A. No, sir.

Q. With reference to the same exhibit did you on or about that date give any instruction to the escrow that borrower furnish lender an ATA policy of title insurance of Western Title Insurance Company? A. No, sir.

Q. Or any instruction in substance to that effect? A. No, sir.

Q. Or at any time? A. No, sir.

Q. I will ask you further with the same exhibit.

Did you on or about that date give any instructions to the escrow that as an agreement between

buyer and seller herein for which you as escrow holder are to have no liability or responsibility; buyer agrees that seller is to receive the August rents on building on lot 8 of tract 3535? A. No, sir.

Q. Or in substance to that effect? A. No, sir.

Q. Or on any other date? A. No, sir.

Q. Now I will show you Debtors' Exhibit 89 which appears to bear date 9-3-63 and ask you concerning item 3.

Did you on or about September 3, 1963, instruct the escrow with regards to rents as follows:

'Buyer agrees to deposit in escrow the amount of rents collected for the month of August on lot 8 of tract number 3535. Said amount to be credited to sellers'? A. No, sir.

Q. Or in substance to that effect? A. No, sir.

Q. Or at any time? A. No, sir.

Q. Did you at any time authorize any other person to give any such instructions as the ones we have discussed? A. No, sir."

And Kapelus was impeached to the same effect by Franklin who testified that he did not give any of the instructions dated August 28, or August 29, or September 3 [R. Tr. 1461-1463].

The most damaging impeachment came from a memorandum (D-87) off a desk pad. Notes in Kapelus' own hand, set out on page 21, Appellees' Brief, *infra*, conclusively demonstrate it was Kapelus' idea:

(1) To increase the amount of the deed of trust note to $20,500 from $15,000;

(2) To increase the interest rate from 8% to 10%;

(3) To require the title company to furnish an ATA policy;

(4) To require the payment of the August, 1963 rents from the apartments on Lot 8.

These notes came to Broussard's escrow at the title company by design and not by accident. The figures "60,722.90" and "20,500.00" and "81,272.90" written on the memorandum were in escrow officer Broussard's handwriting and Broussard testified that instructions given to him for the preparation of instruments he drew in escrow No. 6363RB came from some party to the escrow. Broussard testified [R. Tr. 1128]:

> "Q. I will show you Debtors' 87 which is a memorandum slip with the printed name 'Marvin B. Kapelus' on the top bearing certain penned notations and advise you that this was among the documents here. . . .
>
> . . .
>
> Q. You will observe the handwriting on it? A. Yes.
>
> Q. Can you tell me whose figures they are? A. Those are my figures.
>
> Q. In other words, the figures 60,772.90 is your writing? A. Yes.
>
> Q. And the figure under that? A. $20,500.
>
> Q. That is your writing? A. Yes.
>
> Q. The line is your writing? A. Yes.
>
> Q. And what appears to be the total $80,272.90 is your writing? A. Yes.
>
> . . .

Q. . . . Does the figure 10 percent interest, the first line on that Exhibit Debtors' 87 have any significance to you or refresh you as to the occasion for changing the terms of the $20,500 note from 8 percent interest to 10 percent interest? A. I don't recall the occasion for changing other than I know I was instructed by someone to change."

That someone had to be Kapelus, who testified [R. Tr. 1056-1058]:

"Q. Do you have any recollection of making a note [referring to D-87] of that kind and handing it to Mr. Broussard? A. No, unless he was in my office which he has never been.

Q. Do you have any way of knowing how that got into Mr. Broussard's office? A. Not at all unless it fell out of another file and out of my briefcase.

Q. Could it have been handed to him by you? A. No.

Q. Could it have been left in his office by you? A. As I say, it might have fallen out of my—may I explain how I arrive at this conclusion?

Q. Yes.

. . .

A. I don't know what this was in regard to.

Q. You don't know if that was even in regard to a Franklin matter? A. No. It could have been any one of a dozen things I have handled. The fact that there is something regarding an ATA extended coverage policy would indicate that it was a loan transaction. ATA policy being applicable to loan transactions.

I was probably representing a lender unless—I frankly don't know what it was in regard to. The lender may have asked for an ATA.

Q. Do you notice the figure $20,500? A. As I say it is not my handwriting.

Q. I asked you if you notice the figure $20,-500? A. It could be $20,500 or $20,506. What purports to be a zero isn't completed, so I don't know."

APPENDIX B

Kapelus Denies Drawing Quitclaim Deed to Lot 8, August 15, 1963.

Appellees contended that two weeks after trustee's sale, July 31, Kapelus agreed that Crenshaw would reconvey title to Lot 8 in exchange for a new trust deed securing the debt. Appellees contended that the deed dated August 15, 1963, from Crenshaw on Lot 8 and the August 26, 1963, "wastebasket" escrow instructions evidenced such agreement. Kapelus denied anything to do with Appellees during August, 1963, concerning a proposed new note and deed of trust, and denied he drew the August 15, 1963 deed. Kapelus testified [R. Tr. 1006-1007]:

"Q. I will show you Debtors' 31 which is a corporation quitclaim deed to lot 8.

Was that prepared in your office? A. I don't believe so.

Q. Do you know when it was prepared? A. No, I don't. The reason that I don't believe so is in the body the name of my client is incorrect."

. . .

Q. Have you ever used Land Title Insurance Company forms? A. Yes. I have used all the title company forms.

Q. You don't recall directing anyone to prepare this? A. No.

Q. I will show you— A. What is the date of that?

Q. August 15.

You are referring to the quitclaim deed? A. Yes. I think as of that date we replaced all of our Land Title forms with Security Title forms."

And he later continued [R. Tr. 1048-1049]:

> "Q. Do you have any recollection at all today about this document? A. Only recollection I have of this document is that I had it in my possession. I believe it was delivered to me with the escrow, some of the other escrow documents regarding the trade of Katella.
>
> Q. You delivered that? A. I delivered this to Barnett for signature or to the Barnetts.
>
> Q. You delivered it to Mr. Broussard at United, did you not? A. Yes. I believe I brought it back."

Kapelus was forthwith impeached by his June, 1964, deposition testimony [R. Tr. 1049-1050]:

> "Q. Do you recall what your recollection was about this when you testified on June 23 at your deposition? A. No, I don't.
>
> Q. Well, at page 34 of the deposition—are there any changes in the copy of the deposition that you have? Is that the corrected copy, Mr. Kapelus? A. No.
>
> Q. On June 23 did you not testify with respect to this document which was dated August 15: 'A. The quitclaim deed to lot 8, I believe, was either given to me on the—I may have prepared it. I think I prepared the quitclaim deed myself, and I think I had that sent in with the option after the escrow instructions were signed. I don't have a transmittal in this file. It would be in the lot 8 file.'
>
> Q. Is that testimony in error? A. No, it is not in error. I think it was an *equivocal statement*." (Emphasis supplied.)

Appellees' counsel then sought to discover who had been legal secretary to attorney Kapelus on August 15, 1963 [R. Tr. 1050]:

> "Q. Who was your secretary on August 15, 1963? A. Probably—wait a minute, give me the date.
>
> Q. August 15, 1963. A. I couldn't tell you.
>
> Q. Was it Sandra Lerner? A. Yes.
>
> . . .
>
> Q. Was Sandra Lerner a Notary Public? A. Yes.
>
> Q. Did Sandra Lerner notarize the signatures of Al Barnett and Beverly Barnett on the quitclaim deed on August 15? A. Yes. I believe she accompanied me to their home on that Sunday."

Appellees then produced Sandra Lerner and Kapelus' partner Barnett, each of whom demolished Kapelus' testimony concerning the preparation of the deed [R. Tr. 1191]:

SANDRA LERNER:

> "Q. Did you prepare the August 15, 1963, corporation quitclaim deed? A. I think so."

ALBERT BARNETT [R. Tr. 1436]:

> "Q. Mr. Barnett, I will hand you Debtors' 31 and ask you if you have ever seen that document before? A. Yes, I signed it so obviously I have.
>
> Q. Do you recall signing that document? A. Yes.
>
> Q. Do you recall your wife signing that document? A. Yes.
>
> . . .

Q. Do you know who handed you that document to sign? A. I presume it was Mr. Kapelus.

Q. What is the date that you signed that, Mr. Barnett? A. August 15, 1964, or—wait a minute. Yes."

And Broussard testified he did not prepare the deed [R. Tr. 1154]:

"Q. I will show you Debtors' Exhibit 31 and ask you specifically if you drew that instrument? A. No, we did not."

APPENDIX C

Kapelus Claims Reporter's Transcript Was Full of Errors.

Early in the trial there appeared numerous and substantial contradictions between Kapelus' testimony at trial and his earlier statements in his State court deposition conducted on June 23, 1964. Kapelus blamed the deposition reporter, John R. Davis [R. Tr. 1091]:

> "There has been so many errors in this deposition that I don't know whether I testified verbatim as such or not."

This time it was the court reporter who impeached Kapelus [R. Tr. 1018]:

> "Q. After you were subpoenaed did you examine the transcript? A. Yes, sir, I did.
>
> Q. And make some examination of your notes? A. I read through my notes. Yes, sir.
>
> Q. Is that transcript before you a true and correct verbatim transcription of all that was said at that deposition hearing? A. Yes, sir, to the best of my knowledge it is."

Nevertheless, Kapelus persisted in contending that the deposition was incorrectly transcribed [R. Tr. 681]:

> "Q. BY MR. TROST: In other words, so that I understand this, that the date of the 17th in your deposition on page 31 was wrong? A. That is correct.
>
> Q. It was the 23rd? A. There are numerous changes made in that deposition. The reporter that took that interlineated. There are typographical errors and the deposition was not signed as originally taken."

Kapelus attempted to corroborate his contention of erroneous reporting by stating he had made corrections in the *original deposition* and had given the original to his State court attorney, Mr. Soden [R. Tr. 680]. Kapelus was promptly impeached by his own attorneys, Mr. Stodd and Mr. Harwood. Mr. Stodd stated [R. Tr. 993]:

> "MR. STODD: I am not personally affronted but I would like to have in the record either from the stand under oath or if Mr. Trost will accept it informally I can state that I did contact Mr. Soden's office and was informed by his secretary that she had the original.
>
> "I asked if she could release it.
>
> "She said not without Mr. Soden's authorization. Mr. Soden is out of town now. I asked her to see if it was signed.
>
> "She did say it was not.
>
> "I asked for changes.
>
> "She said there were none, and then I asked her to look in the files for an additional copy which she was unable to find.
>
> "According to her I do not have a copy in the files nor has one been turned over to me nor have I ever seen one.
>
> "THE REFEREE: I think the statement is sufficient. It doesn't have to be under oath."

And Attorney Harwood on Tuesday, December 29, at Appellees' request, produced the original deposition, which contained no changes [D-78; R. Tr. 824-825].

Thus, by the seventh trial day it finally appeared that any changes Kapelus made must have been in a *copy, not the original.*

When Kapelus was interrogated concerning existence of a copy, he testified [R. Tr. 991] that he checked his files and was unable to find the copy. He did not know if Mr. Barnett had it [R. Tr. 992]. But, when confronted with proof that the *original* had not been "corrected", he conveniently found the copy [R. Tr. 1037-1039]:

> "BY MR. TROST: Q. Mr. Kapelus, counsel has produced a copy of your June 23, 1964 deposition containing certain changes. I have that in my hand.
>
> I will hand you that deposition and ask you if that is the deposition that you were referring to when you say you corrected the deposition that was transcribed some time earlier in 1963? A. Yes.
>
> Q. Where did you locate that? A. That was located in a batch of papers over at Mr. Barnett's home.
>
> . . .
>
> Q. Was Mr. Barnett home when you located that? A. No, he was not. The maid was there.
>
> Q. Did your records show any transmittal to Mr. Barnett? A. No.
>
> Q. When did you make those corrections? A. Those corrections were made sometime prior to the date on which this matter was calendared for trial in the State court.
>
> I don't recall the exact date, but it was sometime around August of this year, or last year, pardon me.

Q. When did you sign the deposition? A. At that time.

Q. Did you sign it in front of a Notary Public? A. No. I had it signed and we were going to — well, the answer is no.

Q. Did you make those corrections available to the court reporter or to Mr. Walker?

. . .

A. I don't know. I gave the copy to Mr. Soden prior, just prior to the time of the trial.

Q. Were any of the corrections that are contained in blue ink in that copy made at any time after that date? A. No, I don't believe so.

Q. Is that the copy which you made corrections upon? A. There are some other not in my handwriting.

Q. Do you know if Mr. Barnett made any other corrections? A. I don't see any corrections other than in my hand-writing although there are a couple of scratch-outs here.

Q. When you made the corrections in the deposition were you making corrections in the transcription or corrections in the truth of the statement? A. Some were corrections in transcription and some of them were in regard to some confusion that existed at that time in regard to dates, particularly in regard of dates and sequences of events."

APPENDIX D

Kapelus Denies Receiving December 31 Telegram.

Appellees sent a telegram [D-54] December 31, 1963, to Kapelus tendering performance under the option. Kapelus avoided delivery. He testified inconsistently with reference to the telegram incident: For instance, during examination of Franklin concerning Debtors' 54 the following colloquy from counsel table [R. Tr. 372-373]:

> "Q. Is this the telegram?
>
> I neglected to ask Mr. Kapelus to produce the telegram. I would like to have it in lieu of our copy.
>
> MR. KAPELUS: I can state that that telegram was never received as is witnessed by my letter of a subsequent date. A copy was received though on the 13th of the following month.
>
> MR. WALKER: Do you have a copy?
>
> MR. KAPELUS: I believe so.
>
> MR. WALKER: Would you produce the copy, please?
>
> MR. STODD: This isn't a copy of that telegram. This apparently is some other telegram sent by Mr. Reedy to Mr. Kapelus; isn't it?
>
> MR. KAPELUS: Apparently.
>
> MR. WALKER: Let me see it.
>
> MR. STODD: Second telegram purporting to be a copy of something else."

The *second* telegram is Debtors' Exhibit 55 [R. Tr. 376] and shows "received 1-*17*-64". (Emphasis supplied.)

The second telegram *was not* a copy of the first telegram.

Kapelus, when questioned about the second telegram, testified [R. Tr. 583]:

"Q. You will recall that while you were sitting at the counsel table you produced a telegram that was received by you on January 17, 1964.

I will show you Debtors' Exhibit number 55 for identification. A. Yes.

Q. Do you recall producing that telegram from your file? A. I do.

Q. Do you recall it stating the date on which that telegram was received? A. On or about the 17th.

Q. Do you recall whether or not you said you had ever received any other telegram from Mr. Reedy or Mr. Franklin? A. Would you rephrase the question?

Q. Read it back, please.

(Question read.)

A. At that time?

Q. Yes. A. At the counsel table?

Q. Yes. A. I believe I made the statement that a copy of that telegram or a telegram marked copy was received on the 13th of December of 1964.

Q. Is that the telegram? A. I mean January 13, pardon me.

Q. Is that the telegram that you received? A. No. I believe that the other one was submitted at the time of the taking of my deposition in the State Court matter.

Q. Submitted to whom? A. Mr. Walker.

It may have been added as an exhibit to the original deposition.

Q. In other words, you received two telegrams? A. That is right."

Thus, having finally admitted that he received two telegrams, he testified [R. Tr. 585] that he had "forgotten" about the first telegram.

"Q. You stated that the copy of the telegram that you received was Debtors' 55 for identification? A. I stated that I received Debtors' 55 for identification. However, I had forgotten at the time that I had also received this on or about the 13th.

Q. When was your recollection refreshed that you did receive a copy of a telegram prior to the 17th? A. After reviewing my records in the deposition."

He had to admit receipt prior to the 17th because in his own letter [D-68] dated January 14, 1964 to Reedy he said: "I have at hand your telegram of January 13, 1964 by which you purport to exercise the option. . . ." And Kapelus never did produce the original telegram [R. Tr. 1040]:

"Q. Did you find the telegram that has been missing? A. No."

Kapelus then attempted to put the onus for the "disappearance" of the missing telegram on attorney Walker and reporter Davis who took Kapelus' deposition in the State court action at Walker's office on June 23, 1964. Thus, Kapelus claimed [R. Tr. 584]:

"Q. Is that the telegram that you received? A. No. I believe that the other one was sub-

mitted at the time of the taking of my deposition in the State Court matter.

Q. Submitted to whom? A. Mr. Walker.

It may have been added as an exhibit to the original deposition."

And again Kapelus testified [R. Tr. 588]:

"Q. Where is that telegram that you received on the 14th? A. I don't know. It was submitted at the time of taking of the original deposition.

It was presumed that either Mr. Walker or the reporter had it. It wasn't attached to the original deposition submitted to me."

But Kapelus was impeached by deposition reporter John R. Davis who testified no documents were handed to him at the deposition hearing [R. Tr. 1018-1019].

Davis was corroborated by Walker's testimony [R. Tr. 1345-1346].

APPENDIX E

Kapelus Denies That He Instructed His Secretary on January 21, 1964, to Draw a Deed.

Kapelus first asserted that the option expired on January 16, 1964 by its express terms. If subsequently, on January 21, 1964, he were shown to have agreed to draw a deed conveying back the west one-half of the Katella property, it would contradict his contention that the option had expired.

When examined on this point, Kapelus categorically denied instructing his secretary to draw the deed [R. Tr. 621]:

> "Q. At that time with Mr. Franklin, Janes, and Carol Wood, and Mr. Reedy, did you instruct your secretary to draw the deed that was to be given back to Carol Wood? A. No.
>
> Q. You did not? A. No.
>
> Q. At any time that day in the presence of Mr. Franklin, Mr. Reedy, Mr. Janes and Miss Wood or any of them, did you instruct your secretary to draw the deed? A. No."

Kapelus was impeached by Carolyn Wood [R. Tr. 1218], Franklin [R. Tr. 353], Reedy [R. Tr. 848] and David Janes [R. Tr. 1313].

Carolyn Wood testified [R. Tr. 1218]:

> "We got into the conversation of the deed. I think Mr. Franklin opened the conversation with 'Do you have the deed' or something like that.
>
> "Then I do remember Mr. Kapelus replying, 'Well, I'll have to have it drawn.'
>
> "He called for his secretary and she came in and he told her to draw the deed for Mr. Franklin.

She left the room. I believe he gave her instructions as to the parties conveying it but nothing about the description.

"Of course this was, I believe, metes and bounds description. I recall it was lengthy.

"Mr. Franklin must have thought that too because he spoke up and said, 'What about the description?'

"Mr. Kapelus said, 'She knows the description. She is familiar with the property' or some property. 'She was aware of what property this was.' "

APPENDIX F

Kapelus Claims Tender Under Option Was Not Valid and Someone Tampered With the Option Date.

Kapelus, realizing he was on mortally weak grounds on the mortgage vs. deed issue, retreated to a claim that:

(1) The debtors had previously breached the option;

(2) The tender on January 21, 1964 under the option was too late; and

(3) The tender was improper.

However, on each point Kapelus was effectively discredited.

Kapelus first contended that what seemed to read January 26, in his handwriting, really was January 16, written by him as such and so intended by the parties [R. Tr. 709].

Then, when it appeared to him that the instrument really did read "January 26" *to everyone else but him*, Kapelus began to claim that the instrument must have been tampered with, even though he had contended that what appeared to be a "2" was the way he wrote a "1". Kapelus testified [R. Tr. 702-710]:

> "Q. Did you yourself put the number, whatever it is, before the 6th on that option? A. Yes, I did. I would like to qualify it.
>
> Since obtaining this document or since it being presented in court in checking this against photostatic copies which would arise from the Recorder's office and studying the letter under a glass, the letter before the "6" appears that it is in a dif-

ferent ink or slightly different ink, that a hook has been extended from it.

. . .

"Q. BY MR. TROST: You did write a figure in front of the '6' on the option. That is my question, that was your handwriting? A. Yes.

Q. Was that any particular kind of '1' that you put in there, an Arabic '1' or Roman numeral '1' or what? A. I was attempting to conform the handwriting to the pica '1' or to the pica type that was there on the typewritten face which would be a '1' with a bar below it.

Q. Did you attempt to conform the word 'January' to pica type? A. No, I apparently wrote that, 'January.'

Q. Are those your initials next to January? A. Yes.

Q. Did you write or print your initials? A. I scribbled my initials.

Q. But on the '1' or the figure that was in front of the '6,' that is what you did in conforming with pica type? A. That is correct."

So it became necessary for Appellees to establish:

(1) That the option was prepared by Kapelus;

(2) That the interlineation was in fact made by him, with his own hand at the escrow office in the presence of numerous persons, on September 23, 1963 (although he had earlier testified in his deposition that the meeting at United occurred on September 17, 1963).

Appellees then proceeded to prove that after Kapelus interlineated the option at United on September 23,

1963, the instrument was left on escrow officer Broussard's desk and it remained in the possession of United Title Guaranty Company until recorded. For instance, Broussard testified [R. Tr. 1171]:

> "Q. After it was deposited with you passing for the moment when it was deposited, after it was deposited with you did that instrument ever leave the possession of United Title Guarantee [*sic.*] Company before it was recorded? A. No."

Franklin impeached Kapelus [R. Tr. 339]:

> "Q. . . . After this instrument was corrected in that particular, what was done with it, to your knowledge? A. We discussed it very briefly. Then he handed it to Broussard and said, 'Record this as the next paper.'
>
> Q. Did you ever have that paper in your hand again until after it had been recorded in the Recorder's office of Orange County? A. No, sir. I had it the moment to look at it and to hand it to Mr. Reedy who signed it and then back to Mr. Kapelus."

Reedy also impeached Kapelus [R. Tr. 830-831]:

> "Q. Did you observe this instrument which is marked Debtors' 33 at the time of that discussion? A. Yes, it was there.
>
> Q. Did you observe someone write upon it there in the booth? A. Yes, I did.
>
> Q. Who did you observe write on it? A. Mr. Kapelus.
>
> Q. Where did he write on it? A. He changed the date that the option expired. That would be on page 3.

Q. At the top of the page? A. Yes, sir, the second line on the top of page 3.

Q. What did he do there? A. He wrote a '2' in front of the '6th' day of the month. Then he changed the month of December to January.

Q. Did you observe him do that? A. Yes, sir.

. . .

Q. Then what was done with the instrument, to your knowledge? A. It was given to Mr. — well, Mr. Franklin then read it then he handed it to Mr. Brussard [*sic*].

Q. Was that the last you saw of it in Mr. Brussard's [*sic*] presence? A. Yes, sir.

Q. Did you ever see that document again until after it has been recorded? A. No."

Appellees then prepared several exhibits consisting of blow-ups of the Recorder's recording of the option, in black on white, and in white on black, and introduced them in evidence to show that the Recorder's photograph of the option instrument received from United Title for recording on October 10, 1963, was identical with the exhibit in this case [D. 104, 105]. Indeed, Kapelus never contended the option was to expire on January 16th until after the tender of the option price on January 21, 1964 [R. Tr. 1366].

APPENDIX G

Kapelus Claims He Prepared and Delivered to the Debtors an Assignment of the Judgment.

Kapelus testified [R. Tr. 997-1001]:

> "Q. Did you prepare a copy of an assignment of judgment? A. Not personally. It was prepared by my secretary. I dictated it. . . . It was dictated about, I recall it was probably about three or four weeks before it was actually transmitted. I think it had been lying around on Barnett's desk.
>
> No. I recall we were waiting for Barnett to come into the office and sign it. We finally mailed it to him.
>
> Q. Did Barnett ever come in the office and sign it? A. No. It was mailed to him and he signed it and returned it by mail.
>
> . . .
>
> A. I dictated a letter of transmittal.
>
> Q. When did you dictate the letter of transmittal? A. Sometime that day. I presume *December 6.*" (Emphasis supplied.)

But in his earlier deposition testimony Kapelus, when asked what his *first contact* was with Reedy or Franklin after October 10, 1963, testified it was the *27th of December, 1963* [R. Tr. 1512]:

> " 'Q. . . . I am concerned namely now with the events that transpired with reference to the option, with reference to the property, with reference to your dealings with Reedy or Franklin. What was the first incident? A. Well, wait a minute, I don't understand the question as it is posed. It is a little broad. Do you mean my first contact in

regard to the property or my first contact in regard to Reedy or Franklin, which is it?

Q. Your first contact with Reedy or Franklin."

And Kapelus' Answer [R. Tr. 1513]:

" 'A. It was on the 27th of December, 1963. I sent a *letter* to Curtis Reedy by certified mail in which I requested a copy of the tax statement showing the paid receipt.' " (Emphasis supplied.)

Thus he omitted any reference to a contact of Reedy by his December 6th transmittal letter which purportedly contained the assignment of judgment.

Kapelus was *promptly impeached* on this line by Reedy [R. Tr. 969]:

"Q. Did you ever receive the assignment of the judgment? A. No.

Q. Have you ever seen the assignment of the judgment? A. No."

And Kapelus was impeached to the same effect by Franklin. Moreover, the assignment of judgment was never recorded in the Superior Court action [R. Tr. 370, 1001: Cl. Tr. 109].

APPENDIX H

Kapelus Claims He Required the Estoppel Statement.

Appellants, in support of their contention that the parties intended to transfer title, additionally relied upon the estoppel statement. Kapelus did not let the matter stop there, but testified [R. Tr. 1116]:

> "Q. Would you explain, please? A. . . . I did notice several Advance Sheet notations during that period of time in regard to, I think it was the Workmen Construction case. That was going up on appeal in regard to an alleged claim which was later denied by the Supreme Court that an option contained in the face of a deed would transform the deed in legal effect into a mortgage.
>
> Being cognizant of that this is one of the reasons why I made the demand to Bob Broussard *while we were there* that I wanted no confusion in that respect." (Emphasis supplied.)

But Broussard [R. Tr. 1160] testified that United Title Guaranty Company obtained its title insurance from Western Title Insurance Company; that the title consultant [R. Tr. 1159] Lester Jones, in his own handwriting, prepared the rough draft of the estoppel statement [D-100]. Then Broussard gave these devastating answers [R. Tr. 1160-1161]:

> "Q. Immediately after receiving the instructions that are dated September 16, 1963, did you and Lester Jones confer, talk about that escrow? A. Yes.
>
> Q. After you and Lester Jones talked about that escrow did he prepare the handwritten notes

and furnish them to you that are now marked Debtors' Exhibit 100? A. Yes.

Q. Did you then at the instruction of Western Title Insurance Company prepare this instrument? A. No.

Q. At the instruction of United Title Guarantee [*sic*] Company? A. It is nobody's instruction except for ourselves, I mean Mr. Jones and myself.

Q. Perhaps I should rephrase the question. Was it your idea to prepare this instrument? A. No, not mine; it was Mr. Jones' actually.

Q. So did Mr. Jones instruct *you* to prepare it? (Emphasis supplied.) A. Yes.

Q. And to send it to Mr. Kapelus? A. Yes."

Broussard further testified that the estoppel statement had been drafted and typed by September 17, 1963 [R. Tr. 1158] and 3 copies were sent *to Kapelus* in the covering letter [D-41], which clearly put Kapelus on notice that Western Title would not insure the west one-half of the Katella property unless the statement were signed "For the benefit of Western Title Insurance Company" [D-2]. *"Otherwise this would have to be treated as a deed in lieu of a mortgage and would not be insurable."* [D-41] (Emphasis supplied.)

And Reedy testified further that, on September 23, after all of the documents had been signed by the principals [R. Tr. 831]:

"Q. Toward the same point of time in the escrow booth there, did someone else come to Mr. Broussard's office just before you left? A. Yes. Some official in United Title. . . .

A. He brought a paper in that he said, when he brought it in, he said he would like to have that signed so that he could issue the title insurance because he couldn't issue title insurance unless it was.

Q. Was it signed? A. Yes.

Q. By whom? A. By me."

These circumstances sufficiently interested the Referee that he inquired further of the witness Reedy [R. Tr. 835]:

"THE REFEREE: That is Respondents' Exhibit number 2 placed in front of you.

The title people said you either sign or cannot issue you title insurance. Is that the sum and substance?

THE WITNESS: Yes, sir, exactly right.

THE REFEREE: Mr. Franklin instructed you to go ahead and sign it under those conditions?

THE WITNESS: Yes."

Kapelus' behavior in this instance further provoked the following colloquy between the Referee and counsel [R. Tr. 1576]:

"THE REFEREE: I recall Mr. Kapelus testified that the Workman [sic] case sticks out because he had already read it before he testified. He said he knew it was on appeal and was aware of all the holdings or something to that effect. He got worried about it and he said to keep this from being a security transaction or a possible mortgage situation that in view of what he learned about the preliminary matters in connection with that case that he told Mr. Broussard to change this right now and set up a so-called estoppel letter or affidavit.

MR. TROST: I do.

MR. STODD: That is my recollection and also that Mr. Kapelus testified he was aware that the case was up on appeal. . . ."

The significance of this entire incident occasioned a comprehensive separate finding that the statement was prepared by and for the title insurance company [Cl. Tr. 106].